THE JURIDIFICATION OF ENVIRONMENTAL JUSTICE

Artículo

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Introduction

The image of Lady Justice —fierce, just, trustworthy, unwavering— has become inseparable, in the collective mind, from the judicial system and its purposes. The scales have become the universal symbol for the judiciary, often employed in notary publics' stamps and displayed in and around courtrooms, meant to serve as shorthand for the balancing process the judicial system undertakes when exerting its functions. While justice and the judiciary have been conflated, the concept of justice is not exclusively juridical. Theorists have repeatedly stated that the notion of what I call 'juridical justice' —a phrase which might seem redundant— is merely one of various conceptions of justice: justice according to a legal entitlement.[1] Reducing justice to legal entitlement, particularly in the realm of environmental justice, neglects the moral and social aspects of justice, as

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1 Chaim Perelman, The Idea of Justice and the Problem of Argument 9-10 (1963) (Where it is discussed that other conceptions of justice include: "To each the same thing, To each according to his merits, To each according to his works, To each according to his needs, To each according to his rank, and To each according to his legal entitlements." *See Id.* at 6-10).

the law oft chooses to diminish the role of said aspects in favor of a clearly defined, literary meaning of law. This reduction places the pursuit of environmental justice through courts in peril, and subjects claims of environmental justice to a process of juridification to be redeemed.

Environmental justice has been defined by the United States Environmental Protection Agency (hereinafter, EPA) as the "just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability in agency decision-making and other Federal activities that affect human health and the environment," in pursuit of two main goals: (1) protection against disproportionate human health and environmental effects due to climate change and other structural and systemic barriers, and (2) equitable access to a healthy, sustainable and resilient environment.[2] However, this definition seems lacking in some aspects: what exactly constitutes "just treatment and meaningful involvement"? How does this conception of environmental justice become concrete and enforceable?

Environmental justice itself is a framework that connects environmental issues with social justice. The Principles of Environmental Justice reflect three interpretations of justice: embodying the notions of fairness, procedural access and ecological sustainability.[3] Some theorists have argued that there are two dimensions to environmental justice: distributive justice and participatory justice.[4] While not being the only venue to pursue environmental justice, litigation is a handy tool for it compels the judiciary to actively take a role in shaping how environmental justice issues are addressed. Litigation may be beneficial to environmental justice insofar it may provide useful precedent, spark extralegal activism, educate the public, and provide short-term relief to the limited number of defendants in a given case.[5] However, environmental justice issues are political and economic, which means that, frequently, a legal strategy will be insufficient to fulfill the promise of environmental justice in its entirety.

Litigation also has another effect on climate justice: its juridification. As will be explained in Part I, juridification is a phenomenon in which a social conflict is extrapolated to the legal arena. This process carries with it certain dangers, including the distortion of a controversy, diminished focus on climate change as a collective problem, increased reliance on the judiciary's problem-solving methods which might deter vigorous pursuit of other alternatives, and the increased institutional influence on how environmental justice movements seek to configure their activism. We live in a world of increasing juridification, whether it be with the hopes of slowing societal progress through judicial bureaucracy or

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2 *Learn about Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice/learn-about-environmental-justice (last visited Feb. 6, 2024).

3 Gregg P. Macey & Lawrence E. Susskind, *Secondary Effects of Environmental Justice Litigation: The Case of West Dallas Coalition for Environmental Justice*, 20 Va. Envt'l. L. J. 431, 433 n.4 (2001) (*citing* The Principles of Environmental Justice (EJ) (1991), https://www.ejnet.org/ej/principles.pdf).

4 Robert Figueroa & Claudia Mills, *Environmental justice, in* A Companion to Environmental Philosophy 426-27 (In Dale Jamieson ed., 2001).

5 Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 Fordham Urb. L.J. 523, 541 (1994) (*citing* Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470, 513 (1976)).

conservative rulings, or employing juridical logic to solve social problems, culminating in reform and retrenchment,[6] instead of lasting change. Both the conservative and liberal spheres of political thought share a commitment to juridification for different reasons, yet both overlook how juridification hinders the development of progressive politics, even when yielding seemingly positive results —as will be discussed in Part III(B).

The process of juridification as employed in this article, will be conceived of as operating throughout several layers of the judicial system: Pleading or Claiming, Standing, Redressability, Regulation, and Interpretation. Each of these layers juridifies an environmental justice issue in a different way, often simultaneously, to the point where the pursuit of environmental justice through the judiciary might become senseless, especially in the face of climate change which demands urgent and drastic action. This article employs the point of view asserted by movement lawyering and serves as a point of reflection on points such as: can environmental justice be truly achieved through the court system? What constraints are placed on environmental advocates by the process of juridification?

I. ENVIRONMENTAL JUSTICE AND THE JUDICIAL SYSTEM

Unprecedented back-to-back hurricanes in the Caribbean destroyed Puerto Rico's national electrical grid.[7] Wildfires ravaged Hawai'i, displacing residents and opening the land to market speculation.[8] King salmon population has declined, affecting both Alaskan communities and orcas.[9] All of these seemingly disconnected phenomena have two common denominators: anthropogenic climate change as a cause and vulnerable populations as the most affected.

Anthropogenic climate change describes the causal relationship between increased human production during and following the Industrial Revolution, and the deteriorating, unstable climate effects that are being seen across the world.[10] Poorer nations and populations are bearing the brunt of these climate effects, while rich nations continue to reap the benefits of highly industrialized economies, often at the cost of the former's collective well-being.[11] The failure to address the growing issues of inequitable distribution of cli-

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6 *See generally* KK Ottesen, *An architect of critical race theory: 'We cannot allow all of the lessons from the civil rights movement forward to be packed up and put away for storage'* , THE WASHINGTON POST, https://www.washingtonpost.com/lifestyle/magazine/an-architect-of-critical-race-theory-we-cannot-allow-all-of-the-lessons-from-the-civil-rights-movement-forward-to-be-packed-up-and-put-away-for-storage/2022/01/14/24bb31de-627e-11ec-a7e8-3a8455b71fad_story.html (last visited Apr. 24, 2024) (where Crenshaw discusses her book *Race, Reform and Retrenchment*, stating that reform inevitably reproduces retrenchment and backlash as a response, and said backlash is often more drastic than the initial reform itself).

7 *Hurricanes Irma and Maria: Impact and Aftermath*, RAND, https://www.rand.org/hsrd/hsoac/projects/puerto-rico-recovery/hurricanes-irma-and-maria.html (last visited Apr. 7, 2024).

8 Matthew Impelli, *Investors are Calling Maui Wildfire Victims to Buy Their Hawaii Land*, NEWSWEEK (Aug. 14, 2023), https://www.newsweek.com/investors-calling-maui-wildfire-victims-buy-their-land-1819600.

9 Kat Caulderwood & Julia Jacobo, *King salmon populations are dying, simultaneously affecting orcas and local Alaskan communities*, ABC NEWS (Feb. 28, 2024), https://abcnews.go.com/US/king-salmon-populations-dying-simultaneously-affecting-orcas-local/story?id=105622426.

10 *See Anthropocene*, NATIONAL GEOGRAPHIC, https://education.nationalgeographic.org/resource/anthropocene/ (last visited Apr. 7, 2024).

11 Figueroa & Mills, *supra* note 4, at 426.

mate harms has led to the global strengthening of the environmental justice movement.[12]

Environmental justice is succinctly defined as embodying two main aspects:

> (1) [S]ubstantive aspect: fair and equitable exposure to environmental risks and benefits. *Fair treatment* means no group of people should bear a disproportionate share of the negative environmental consequences. Justice requires equal treatment. (2) procedural aspects: meaningful involvement in environmental decision-making, access to public participation and information about the environment, and access to justice to litigate environmental issues. Justice requires equal participation.[13]

Environmental justice has its roots in the concept of environmental racism,[14] yet has since expanded to include other social dimensions that define vulnerable populations such as gender, class, and disability.

Table 1.1 The social and environmental dimensions of recent environmental justice research

Social dimensions	*Environmental dimensions*	
Race	Air pollution	Greenspace
Ethnicity	Accidental hazardous releases	Outdoor recreation
Class	Waste landfills	Mineral extraction
Income	Waste incinerators	Hog industry
Deprivation	Contaminated land	Emissions trading
Gender	Brownfield land	Oil drilling and extraction
Single parent families	Urban dereliction	
Households in social housing	Lead in paint and pipes	Access to healthy food
Older people	Flooding	Fuel poverty
Children	Noise	Wind farms
Indigenous peoples	Drinking water quality	Nuclear power stations
Disability	River water quality	Climate change
Deafness	Transport	Trade agreements
Special needs	Forest fires	Alcohol retail outlets
Future generations	Whaling	Biodiversity and genetic resources
	Wildlife reserves	
	Agriculture	Genomics
		Land reform [15]

12 *Id.*

13 Hon. Winston Anderson, Judge of the Caribbean Court of Justice, The Concept of Environmental Justice at Annual Law Conference of the Guyana Judiciary (Jun. 30, 2023), https://ccj.org/wp-content/uploads/2023/09/Anderson_20230630.pdf.

14 In his speech, the Hon. Winston Anderson stated:

> The term first appeared as a descriptor of a social movement in the USA in the 1980s to address the unfair exposure of poor and marginalized communities to harms associated with resource extraction, hazardous waste, and other land use practices. Hence, the birthplace of the "environmental justice movement" in Warren County, North Carolina, where the dumping of PCB-contaminated soil in 1982 in a predominately Black community sparked massive protests —over 500 people were arrested. The unrest led to studies which showed that race was the most important predictor of where hazardous waste facilities in the US would be located; hence, an original "frame" or "lens" for environmental justice was environmental racism."

Id. at 1. *See also* Gordon Walker, Environmental Justice: Concepts, Evidence and Politics (2012).

15 Gordon Walker, Environmental Justice: Concepts Evidence and Politics 2 tbl.1.1 (2012).

Environmental justice purports to achieve justice on a broad scale and across generations, and the judiciary, while not equipped to address every aspect of environmental justice, is clearly implicated when it comes to both substantive and procedural issues. Rights and regulations govern many of the substantive aspects of law, including how risk is distributed and minimized, while procedural access is a hallmark value of the judicial system.[16] Thus, while not exclusively a juridical concept, any responsible discussion geared toward achieving environmental justice must necessarily discuss the judicial branch's role in assuring procedural access and promoting substantive fairness regarding environmental justice claims. Effective environmental litigation, then, will incorporate as many of the social dimensions listed above into the environmental dimensions that are affected in a particular case.

Even with this incorporation in mind, advocates must be aware that current regulation does not envision the entirety of the social and environmental dimensions encompassed in the concept of environmental justice. While there is a whole body of law crafted to regulate interactions with the environment, most of it was crafted before the gravity of climate change became evident. As such, the ways in which the law understands environmental justice issues could be antiquated; in a sense, they force environmental justice claims to be retrofitted to an understanding of climate change that is no longer effective at tackling the present reality.[17]

Environmental justice understands the environment and social difference as intertwined, but its advocates frame its pursuit as objectives; this is beneficial because "the act of producing and publicizing an objective-based definition is a key part of constructing a politically powerful environmental justice frame around which people are to be recruited and mobilized."[18] The broad links environmental justice makes between environment and social difference are channeled through specific objectives, i.e. claims about the unfairness of the worst consequences of greenhouse gas (hereinafter, GHG) emissions being borne by the poorest countries is channeled through the objective of urging the richer countries to do more, as the principle of Common but differentiated responsibility states.[19]

Now, what role should the lawyer play in advocating for environmental justice, and how should they go about it? Movement lawyering urges lawyers to work alongside advocates, communities and social justice groups to advance their interests by various means,

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16 *See* Statement of Purpose, Judiciary Act of 2003, 4 LPRA §§ 23-25r (2018 & Supl. 2022).

17 As stated by Jeff Todd:

> Finally, although the scientific understanding of complex phenomena like climate change has evolved rapidly in the last few decades, federal environmental statutes like NEPA and the Clean Air Act ("CAA") were designed "to deal with the environmental problems that were known at [the] time" they were enacted, in the late 1960s through the early 1980s. Accordingly, they are "clunky tool[s]" for dealing with problems like climate change.

Jeff Todd, *A 'Sense of Equity' in Environmental Justice Litigation,* 44 HARV. ENVT'L. L. REV. 169, 183 (2020) (*citing* Michael B. Gerrard, *What Does Environmental Justice Mean in an Era of Global Climate Change*, 19 J. ENVT'L. & SUSTAINABILITY L. 278, 281 (2013)).

18 WALKER, *supra* note 14, at 8.

19 U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, art. 3, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992).

including litigation.[20] However, in the case of environmental justice, critics have claimed that litigation is often insufficient to achieve an adequate remedy.[21] Yet other scholars have claimed that environmental justice litigation has a two-fold effect: the direct impacts (obtaining an injunction, halting environmentally unsound construction) and the indirect impacts (communities rallying around common objectives, obtaining important information through discovery, educating the public).[22] A key part of environmental justice litigation, as previously mentioned, will be to elucidate the plaintiff's objective, as the litigation process can be a costly undertaking, which could be unadvisable if there is little to no chance of victory, or if there is a chance of a victory becoming pyrrhic, possibly demoralizing otherwise fierce advocates.[23] Legal victories for environmental justice claims are not always entirely positive due to the juridification these issues are subjected to once the choice is made to move forward with litigation.

II. The Phenomenon of Juridification

Juridification is defined in the field of sociology as the "process in which human conflicts are torn through formalization out of their living context and distorted by being subjected to legal processes."[24] Functionally, it highlights the relation between politics and law, since juridification can be understood as "the expropriation of social conflict" into the legal field.[25] This process of expropriation occurs simultaneously at various levels: (1) the filtering of social maladies through legal technicalities such as claim plausibility, standing and redressability; (2) the legal system's understanding of rights as individual legal entitlements, which consequently excludes collective rights from the courtroom, due to either lack of recognition or enforcement capabilities, and (3) the constraints placed by politics, public policy, and *stare decisis* on judges' exercise of discretion in solving novel controversies. Each of these levels shall be observed in detail.

Juridification is still a novel term that lacks defined boundaries, but scholars from various fields have theorized about how this phenomenon expresses itself and affects social issues. Blichner and Molander have identified at least five dimensions of juridification, and at least three of those dimensions describe the juridification of climate justice: juridification as (1) a process through which law regulates an increasing number of activities; (2) a process through which conflicts are increasingly solved by or with reference to law,

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20 Jocelyn Simonson et al., *What Movements Do to Law*, Boston Review (2022), HTTPS://WWW.BOSTONREVIEW.NET/ARTICLES/WHAT-MOVEMENTS-DO-TO-LAW/.

21 Todd, *supra* note 17, at 181.

22 Macey & Susskind, *supra* note 3, at 437-38.

23 Seth Jaffe, *Can You Say 'Pyrrhic Victory'?*, Law & The Environment (Apr. 4, 2019), https://www.lawandenvironment.com/2019/04/04/can-you-say-pyrrhic-victory/.

24 Gunther Teubner, *Juridification: Concepts, Aspects, Limits, Solutions*, *in* Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law 3, 7-8 (Gunther Teubner ed., 1987).

25 Mariavittoria Catanzariti, *The juridification of vulnerability in the European legal culture*, 12 Oñati Socio-Legal Series: Legal Culture and Empirical Research, 1391, 1396 (2022), https://opo.iisj.net/index.php/osls/article/view/1442.

and (3) a process by which people increasingly think of themselves and others as legal subjects.[26] Simply put, however, juridification is akin to a process where legal influence on social phenomena increases to the point where it derails the natural course of development of said phenomena. Anne-Mette Magnussen and Anna Banasiak have proposed an analytical framework in which the relation between politics and the law hinges on the extent and manner of juridification taking place.[27]

May 2013 *Juridification*

Table 1. Relationships between Law and Politics

		Law	
		Strengthened	Weakened
Politics	Strengthened	*A. Political juridification*	*C. Politicisation of the law*
	Weakened	*B. Juridification of the political*	*D. Privatisation*

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The type of juridification with which this article is concerned can be found in the above table labeled as *Juridification of the political*, which implies a political weakening and a legal strengthening in the approach and subsequent framing of a conflict.[29] Political can have two meanings here: political as in political institutions, and political as in *body politic*, or the people. To avoid confusion in this article, unless explicitly stated otherwise, political will refer to the former, while social will refer to the latter. Nonetheless, the political, the legal, and the social interact in the Juridification of the Political insofar as "an extensive juridification of politics [that] may imply, for example, that the courts decide the context of social rights to a greater degree."[30]

In the case of the juridification of climate justice, environmental law controversies lie at the heart of this process. Fights over land health become disputes between owners and passersby, between developers and residents. Concerns over coastal damages due to dredging are reduced to the economic benefits of allowing the navigation of larger vessels

26 The authors describe the concept as:

> First, constitutive juridification is a process where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system. Second, juridification is a process through which law comes to regulate an increasing number of different activities. Third, juridification is a process whereby conflicts increasingly are being solved by or with reference to law. Fourth, juridification is a process by which the legal system and the legal profession get more power as contrasted with formal authority. Finally, juridification as legal framing is the process by which people increasingly tend to think of themselves and others as legal subjects.

Lars Chr. Blichner & Anders Molander, *Mapping Juridification*, 14 EUROPEAN LAW JOURNAL 36, 38-39 (2008).

27 *See* Anne-Mette Magnussen & Anna Banasiak, *Juridification: Disrupting the Relationship between Law and Politics?*, 19 EUROPEAN L. J. 325, 329-38 (2013).

28 *Id.* at 329.

29 *Id.* at 332-35.

30 *Id.* at 339.

versus the damages fishing communities and marine biomes will suffer.[31] In both cases, social issues such as land health, food security and marine wildlife preservation are removed from the arena of the social —where the marketplace of ideas would follow its course, swaying skeptics and dissuading those with the least convincing argument— to the arena of the legal, where abstract technicalities and judges' interpretations of them impose an arbitrary standard, often removed from material reality. As legal intervention on climate justice issues increases, environmental advocates' goals will be interrupted and potentially distorted by the nature of the legal system and the particular criteria to bring forth environmental law claims.

A. Filtering: the Incompatibility of Climate Issues with the Legal Process

i. Claiming

Claiming is the way individual rights are invoked to file suit. In a case, the manner in which the defendant chooses to plead their rights and how they have been violated serves two purposes: first, it ensures claim plausibility, which is the initial hurdle a lawsuit usually must overcome following a motion to dismiss. Second, and equally important, this phrasing creates a narrative; it spells out the roadmap from the defendants' actions to the damage the plaintiff consequently suffered. These two aspects of the process of claiming —one of a substantive, legal nature, and another of a human, quasi-literary nature— highlight claiming as one of the stages in which climate justice issues undergo juridification.

When it comes to claim plausibility, the standard the Supreme Court has set out in *Ashcroft v. Iqbal* remains practically untouched. A claim must contain sufficient factual content, somewhere between detailed allegations and unadorned accusations that, if accepted as true, would allow the court to draw a reasonable inference that the defendant is liable for the alleged harm.[32] Furthermore, the task of determining whether a claim is plausible will be a context-specific exercise of judicial discretion, drawing on judicial experience and common sense.[33]

In a typical environmental justice issue, suppose a forest and adjacent impoverished neighborhoods are allegedly harmed by emissions and waste discharges from a nearby manufacturing facility. For a claim to be plausible, it must be articulated clearly, linking the harm directly to the facility's actions. While arguments emphasizing the forest's innate well-being can mobilize environmental justice movements, they often face skepticism in court due to challenges in establishing an immediate link between the factory's specific emissions and observable decay in the forest over years. Such claims often fail to meet factual thresholds as courts tend to view environmental harms as speculative.[34] Additionally,

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31 El Puente v. U.S. Army Corps of Eng'rs, Civil Action No. 1:22-cv-02430 (CJN), 2023 U.S. Dist. LEXIS 126527 (D.D.C. July 24, 2023).

32 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

33 *Id.* at 678-79.

34 *See* Surfrider v. ARPE, 178 DPR 563, 581 (2010) (exemplifying the Supreme Court's tendency to rule environmental harms as speculative).

a mandate calling for judges to draw on *judicial experience* to determine plausibility may lead them to determine that environmental justice claims based on narrow, individual rights are generally more plausible than those based on broader rights to a healthy environment. As such, activists may choose a different set of claims to vindicate their rights, such as nuisance or tort claims. In effect, those climate justice issues have been juridified. The initial issue, once dissected by the legal process —the first step of the process, no less— has been diluted to be no more than a claim vindicating individual rights instead of an overarching, collective right. This is the issue Briker so accurately illustrates:

> While activists do not necessarily fear losing in court—and can even turn losses to their advantage—dismissal at an early stage of litigation may be particularly demobilizing. As such, plausibility pleading may encourage movement litigants to embrace safer legal claims, even if more experimental arguments would serve as better political-framing devices. On the most pessimistic view, the pressure to make safer claims does not simply distort movements, but might undermine collective action as American legal culture primarily recognizes "individualistic" rights.[35]

As Briker points out, activists may very well opt for safer legal claims instead of the more accurate, political, and socially vested claim and, in the process of doing so, surrender the desire of achieving larger change as envisioned by the movement at its conception. When replicated throughout multiple social justice movements across issues of gender, race, and class, limiting claims to a rigid plausibility standard can significantly constrain the collective political imagination of a society.

On the other hand, claiming also has a narrative component, in which each side in a lawsuit, through petitions, creates a storyline weaving together the facts and the law to appeal to a moral, aesthetic, or ethical aspect of the case, in hopes of swaying the judge by portraying the case in a certain light. In this sense, activists may be inclined to frame their claims in such a way that reflects their movements' beliefs, advances their political goals, represents collective action or optimizes collective benefit. They may "generate powerful indirect effects by articulating clear frames which can in turn be drawn upon in extralegal activism."[36] They may also find the law agrees with their claims as stated, creating powerful precedent for the movement. And yet, the threat of the motion to dismiss looms. On the other hand, activists who choose safer claims may forfeit these more idealistic ways of engaging with the law in favor of assuring their day in court, choosing to adopt a narrative that may not necessarily reflect the values or goals upon which their activism is founded.

Determining which claims to bring before court has, traditionally, been a purely legal, strategic decision within the domain of the lawyer. Nonetheless, recent trends such as movement lawyering caution us not to usurp a social issue or an injury in the name of securing a legal victory.[37] In a world of increasing juridification of climate justice is-

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35 Gregory Briker, *The Anatomy of Social Movement Litigation*, 132 YALE L.J. 2304, 2320 (2023) (footnotes omitted).

36 *Id.* at 2321.

37 Jocelyn Simonson et al., *supra* note 20.

sues,[38] where movement litigation is seen as a reasonable vehicle to seek justice following climate change devastation,[39] claims are the means through which plaintiffs gain a voice. Claiming becomes a process whereby the plaintiff chooses which story to tell: the story of material reality, where climate change is a collective threat requiring innovative solutions and concerted actions, or that of legal technicality, where climate change is but a footnote affecting individual socioeconomic rights, thus reducing the ambition of sociopolitical imagination.

ii. Standing

Standing figures as another prominent legal hurdle in the quest for environmental justice. Standing to sue is a threshold requirement for any case, meaning a party must establish standing before a court can consider the merits of their claim.[40] It is a concept which "ensure[s] that courts [decide] actual, specific controversies and not abstract questions or moot issues."[41] While states and the federal government have developed different doctrines governing standing to sue,[42] they are both meant to serve as safeguards against frivolous cases and unmotivated plaintiffs; the doctrine of standing is meant to assure that the plaintiff's interest in a cause of action is such that he will pursue it vigorously and promptly call the court's attention to the issues at stake.[43] The current federal standing doctrine requires plaintiffs to have suffered palpable, real and immediate damage, and to establish a link between the defendant's action and the damage suffered.[44] Thus, Article III standing requires plaintiffs to show injury, causation and redressability.

a. Injury-In-Fact and Causation

The first two requisites of standing are in stark contrast with what is known about climate change. The injury-in-fact requirement is met by proving the existence of a particularized harm, while climate harms are, by definition, common injuries differentially experienced notwithstanding the location of a particular causal agent.[45] Secondly, the im-

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38 UN Environment Programme, *Global Climate Litigation Report: 2023 Status Review*, Columbia Law School (2023), https://wedocs.unep.org/bitstream/handle/20.500.11822/43008/global_climate_litigation_report_2023.pdf?sequence=3.

39 *See* Camila Bustos, *Movement Lawyering in the Time of the Climate Crisis*, 39 Pace Envt'l L. Rev. 1, 13-29 (2022).

40 Voss v. Quicken Loans LLC, No. 1:20-cv-759, 2021 WL 3810384, at *4 (S.D. Ohio Aug. 26,2021).

41 State ex rel. Leibowitz v. Family Vision Care, LLC, 2020 IL 124754, 450 Ill. Dec. 438, 181 N.E.3d 790, ¶27 (Nov. 19, 2020) (citation omitted).

42 Federal standing to sue arises from Article III and its "case or controversy" requirement, whereas states create their own rules regarding standing. Puerto Rico, for example, adopted Article III Standing in its landmark case *ELA v. Aguayo*, 80 DPR 552 (1958), but added a fourth prong to the federal standing test, namely that the cause of action arises from a law or the Constitution.

43 *See* Hernández Agosto v. Romero Barceló, 112 DPR 407, 413 (1982).

44 Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

45 Barry Kellman, *Standing to Challenge Climate Change Decisions*, 46 Envt'l L. Rep. News & Analysis 10116-17 (2016).

mediacy prong of the injury-in-fact requirement is also difficult to overcome when considering climate change. Although climate science has made great strides, courts seem partial to believe that adverse climate effects still fall into the realm of speculation. In *Center for Biological Diversity v. Department of Interior*, the court denied standing because the plaintiffs could only assert that significant adverse climate effects may occur at some point in the future and thus did not satisfy the showing of imminent injury required by the standing doctrine.[46] Immediacy is often unprovable when it comes to environmental harms, as these tend to have multiple concurring causes with varying degrees of responsibility. While the standing doctrine is meant to serve as a tool for judicial constraint and respect for the separation of powers, its rote application in climate cases, where the international Principle of Preventive Action explicitly states that scientific certainty is not required for a duty to avoid climate harm to arise,[47] seems to dispense unjustly with environmental justice claims.

The *Friends of the Earth* majority opinion has reiterated that to have standing in an environmental case, the criterion "is not injury to the environment but injury to the plaintiff."[48] Thus, for plaintiffs to prevail in environmental cases, they must demonstrate a real, palpable, immediate damage that has caused the specific plaintiff an injury in fact. The intricacies of climate change and the damage it causes, seem at this point, elusive to the courtroom's understanding of terms such as injury. A reason for this may be a limited conception of the all-encompassing implications of climate change:

> [A] set of cognitive biases allegedly make political commitment especially elusive around climate change. Climate change so far lacks the charismatic or terrifying images that give an issue "salience" —centrality and power in the public mind . . . . the scale of the problem tends to overwhelm and numb, rather than spur, motives to respond. Finally, the distance in space and time between the acts that contribute to climate change and its final effects is much greater than human causal perception and the conjoined sense of responsibility evolved to contemplate, meaning instinct draws us toward incomprehension and indifference. The complexity of climate processes only worsens this inhibition. To summarize, human beings may be hard-wired not to arrest even a catastrophic process if it is diffuse, hard to envision, and delayed in time, particularly when the actions that drive it are immediate, conventional, and convenient (such as driving).[49]

The same is true for environmental considerations in the courts; reductionist views of climate injuries concerning what is the palpable damage and who is the specific individual who suffered it, stem from a difficulty of both the legal system and its main actors to envi-

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46 Ctr. for Biological Diversity v. U.S. DOI, Civil Action No. 22-cv-01716 (TSC), 2023 U.S. Dist. LEXIS 195761 (D.D.C. Nov. 1, 2023).

47 Max Valverde Soto, *General Principles of International Environmental Law*, 3 ILSA Journal of Int'l & Comparative L. 193, 199 (1996).

48 Friends of the Earth, Inc. v. Laidlaw Environmental Services, 528 U.S. 167, 169 (2000).

49 Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 Yale 1122, 1134-35 (2010) (footnotes omitted).

sion the chain of causation between a specific defendant's contribution to climate change, and the magnitude of its implications. Standing requirements juridify environmental justice by requiring its advocates to abdicate their accurate claims of common harm to gain access to courts. It forces advocates and movements to continually frame their experiences as individual, secluded happenings instead of symptoms of a larger, global issue.

b. Redressability

In environmental injury cases, redressability is a key requirement for establishing standing. A plaintiff must demonstrate that a favorable decision is likely to alleviate or reduce their injury. The redressability requirement is satisfied "if it is 'likely, and not merely speculative, that a favorable decision will remedy the injury.'"[50] The relief sought "must specifically redress the injuries to the plaintiffs' members, 'as opposed to merely advancing generalized environmental interests.'"[51] Redressability limits environmental claims insofar it discourages plaintiffs from expressing the magnitude of climate damages, being instead limited to what specific part of climate change was caused by which specific action of the defendant, and to what magnitude such damage was directly caused by said action, so that said damage may be accurately assessed in monetary terms. Consider the following analysis by Kimberly Large of the *Steel Corporation* decision:

> Redressability is the third prong of the Article III case-or-controversy requirement for standing. Citizens' members claimed a past, present, and future impact on their "safety, health, recreational, economic, aesthetic and environmental interests." They sought varied forms of relief, including a declaratory judgment, civil penalties, their costs, and authorization of periodic inspections of Steel Company's records and facility. The Court found that the citizen group lacked standing because the injury complained of was not redressable. The Court found no basis for declaratory or injunctive relief because "there were no allegations of ongoing or imminent injuries." Further, the civil penalties sought were payable to the United States Treasury and not the plaintiffs; thus "because the penalties did not remediate plaintiff's own injuries but vindicated the rule of law—'the "undifferentiated public interest"'—the award of civil penalties did not remedy plaintiff's injuries." The potential effect of punishment as a deterrent also failed to satisfy the redressability prong because "psychic satisfaction is not an acceptable Article III remedy."[52]

The majority opinion, authored by Justice Antonin Scalia, raises another concern regarding the redressability of environmental harms, which is the *adequacy* of the relief

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50 N.C. Coastal Fisheries Reform Grp. v. Capt. Gaston LLC, 560 F. Supp. 3d 979, 993 (E.D.N.C. 2021) (*citing* Friends of the Earth, Inc. v. Gaston Copper Recycling Corp., 204 F.3d 149, 154 (4th Cir. 2000)).

51 [51] Ctr. for Biological Diversity v. Univ. of N.C., No. 1:19-cv-1179, 2021 U.S. Dist. LEXIS 163459 (M.D.N.C. Aug. 30, 2021) (*citing* WildEarth Guardians v. Public Service Co. of Colorado, 690 F.3d 1174, 1190 (10th Cir. 2012).

52 Kimberly M. Large, *The Mischaracterization of Justice Scalia as Environmental Foe: What Harm to Standing following the Court's Stance in Laidlaw Environmental v. Friends of the Earth*, 10 Widener L. Rev. 561, 565-66 (2004).

that courts can offer. Article III remedies are only acceptable when they redress Article III injuries;[53] but if environmental justice claims cannot be properly formulated as Article III injuries, then, will court-approved remedies ever be sufficient?

Therefore, redressability requirements juridify climate justice issues in two ways. First, they demand that the redress sought specifically remedy the injury sustained by the plaintiff; it assumes a relation of causation between defendant's action and plaintiff's harm, where a more accurate relation would be that of contribution. When pertaining to the redressability of environmental harms, however, the applicable norm should be one similar to that of *Ohio Valley v. Hobet Mining*, where even the slightest reduction in pollution was considered a redress as it mitigated the impact of the defendant's actions on the plaintiff's use of a water body.[54] Nonetheless, seeking redress because a defendant contributed to a plaintiff's harm is traditionally seen as speculative, with *Ohio Valley's* ruling being a notable exception. Second, redressability requirements limit justice to that which is within courts' purview to grant, namely monetary damages, reissuance of environmental impact statements, and declaratory and injunctive relief.[55] More often than not, these remedies arrive after the fact:

> The most central objection here has to do with the primary logic of environmental law, that redress of environmental harm already suffered is entirely too little too late. No one would or should accept a legal system that addressed environmentally destructive activities only after the fact as a matter of responsibility in tort. All environmental statutes are designed primarily to prevent or deter harm, not redress it. It is often difficult to know, however, who might be harmed by ill-performed prevention responsibilities, as the harm the statute is designed to address has not happened and may never happen.[56]

The truth is that environmental justice demands are broader than what courts conceive as adequate relief: the promise of environmental justice is fulfilled through systemic integration of intersectionality, environmental consciousness, and a deconstruction of individualistic societal values, none of which is within a court's capacity to grant. Limiting redress for climate change to what courts consider adequate relief juridifies environmental justice insofar it can deter social justice movements from seeking broader change or becoming demoralized in their demands for broader, systemic change. Climate justice in itself is not a goal pursued for individualistic purposes; however, legal juridification makes it so claims for collective climate justice are imperatively expressed in terms of individual, particularized injury lest they be dismissed, thus reducing the efficacy and scope of their

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53 Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 107 (1998).

54 Ohio Valley Envtl. Coalition, Inc. v. Hobet Min., 702 F. Supp.2d 644 (S.D.W.Va. 2010).

55 Macey & Susskind, *supra* note 3. *See also* Víctor Rodríguez Velázquez, *Acelerada la aprobación de permisos de construcción en la costa durante el primer año de Pierluisi*, CENTRO DE PERIODISMO INVESTIGATIVO (Jan. 27, 2022), https://periodismoinvestigativo.com/2022/01/acelerada-construccion-costas-pedro-pierluisi/ (where environmental law professor Érika Fontánez Torres states that when environmental claims arise, the damage, whether it be to a habitat or to a community, is usually done and of an irreparable nature).

56 Kellman, *supra* note 45, at 10117.

impact. This argument echoes Mark Tushnet's in "The Critique of Rights," where he states that the promise of individual rights cannot solve collective problems.[57]

B. Understanding: How Environmental Regulation Highlights the Political Nature of the Law

i. Regulation of the environment: individual rights for collective problems

Environmental justice claims are usually brought to court relying on one of the following four legal tools (or any combination thereof):

1. Environmental laws, especially those which focus on procedure, in a traditional manner.
2. Environmental laws, particularly those which mandate public participation, used with a twist.
3. Civil rights laws, particularly Title VI and Title VIII of the Civil Rights Act of 1964.
4. Constitutional claims, based on the equal protection clause of the Fourteenth Amendment.[58]

While environmental justice claims are intimately related to civil rights struggles, framing environmental justice as purely under the domain of civil rights has not yielded positive results for advocates in the past.[59] Although civil rights claims are concerned with many of the social dimensions outlined above, the judicial system is more prone to consider environmental justice claims brought in the context of environmental regulation, as the latter tends to be clearer and more precise, instead of the broad, sweeping rulings that tend to be sought by civil rights claims against the government.[60] Thus, the most effective way to get the judicial system to fully understand the complexity of an environmental justice claim is to combine civil rights claims with environmental law challenges, which allows advocates to push the law towards change while also maintaining victory within their grasp.[61]

Outside of civil rights claims, environmental law —or the body of law drafted to protect the environment— has been articulated in the United States around the following three fundamental approaches to environmental problems, instead of protection to the environment itself: (1) common law actions, such as torts or public nuisance; (2) the governmental aggregation (through administration) of externalities whose harms are valued below the costs of their contractual resolution or judicial prosecution, and (3) the establishment of constructed markets in order to achieve societal ends, such as those envisaged by the Clean Air Act.[62] The environment itself is never the object of protection in these

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57 *See* Mark Tushnet, *The Critique of Rights*, 47 S.M.U. L. Rev. 23, 30 (1993).

58 Cole, *supra* note 5, at 526 (footnotes omitted).

59 *Id.*

60 *Id.*

61 *Id.*

62 David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. Davis L. Rev. 619, 621 (1994).

approaches: nuisance, for example, regulates harms in which the environment is the medium of the harm, not the object.[63]

While tort claims are undoubtedly appealing for the different remedies they allow, be it money damages or equitable relief, they also present issues of proving traceable causation and particularized harm which, as previously discussed,[64] can present a roadblock for claims of a broader environmental justice perspective:

> Tort law was designed to remedy situations in which a single plaintiff can show a clear harm caused by a single, identifiable tortfeasor. Modern environmental tort lawsuits typically lack all three because they involve a long latency period, diffuse harms affecting multiple victims, and diffuse origins from multiple tortfeasors. Moreover, persons from poor and minority communities face additional difficulties. For example, the harm might relate to operations that lasted for decades, so companies might no longer exist or cannot be identified. Further, persons of color and the poor are often exposed to numerous background hazards in their community, workplace, and food, all of which may be causally linked to the harm they have suffered. Accordingly, it is more difficult for them to show that the actions of any one defendant more likely than not caused any particular harm, which is required to prove causation.[65]

As environmental regulation strengthened during the 70's and 80's, other avenues to redeem environmental protection became available to the public. Namely, the Clean Air Act, Clean Water Act, and similar laws were passed to regulate environmental harms. While initially effective for assuring conservation, the effectiveness of these laws dwindled as Posner's law-and-economics approach —pushed by corporations— infiltrated the judiciary and legislative branches. This approach encouraged lawmakers and judges towards the consideration of cost-benefit analyses in an effort to weaken regulation.[66] Thus, the famous false dichotomy of environmental conservation versus economic development was born.

Interestingly, both environmental regulation in the US —whether through civil claims or environmental law— and traditional definitions of environmental justice (such as the one adopted by the EPA) have been criticized for centering justice for humans and not justice for the environment itself.[67] Instead, the current system is environmental law by proxy, where in order to protect the environment as a collective, individual socioeconomic rights must be invoked as these lay at the heart of the current Western legal system. This becomes evident as we analyze the cited approaches in terms of personal or economic harm: torts, externalities and market establishment. Even harms such as reputational harm or vi-

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63 *Id.* at 633.

64 Todd, *supra* note 17, at 182.

65 *Id.* at 181 (footnotes omitted).

66 David M. Driesen et al., *Half a Century of Supreme Court Clean Air Act Interpretation: Purposivism, Textualism, Dynamism, and Activism*, 75 Wash. & Lee L. Rev. 1781, 1792-93 (2019) (where it is discussed that the Clean Air Act, originally enacted with the purpose of prioritizing environmental protection then suffered after corporations championed Posner's law and economics approach and cost-benefit analyses to weaken regulation).

67 *See* Anderson, *supra* note 13.

olations of privacy rights are often reduced to the realm of economics. This is one way the judicial system's incapacity to conceive of environmental harms as anything but economic necessarily juridifies environmental justice claims, as it relegates all the aforementioned social dimensions to a narrow, individualistic view of what is actually at stake in these cases. Thus is the underpinning of the current legal system revealed: non-economic harm can seldom be adequately understood —and much less redressed— in the current legal system, which is why the environment itself does not have an apt guardian in the field of law.

ii. The Value of Nature

While other judicial systems have declared rights for the environment itself to move away from anthropocentric regulation and toward ecocentric protection, the US has failed to do so.[68] Environmental advocates have pushed for this recognition of new collective rights that are not linked directly to those of humans but have yet to achieve their goals. This is partly explained because environmental justice movements have limited capacity to affect environmental law due to politics and market-based regulations.[69] In general, environmental law is fought on the terrain of economics.[70] This means that economically and politically powerful sectors —usually linked to economically unsafe industries such as oil and gas— have continuously lobbied in favor of tipping the scales toward economic development and away from strict regulation, in an effort to protect those activities most valuable to them.[71] As a result, "by the mid-1990s both elite and political opinion had shifted away from supporting rights-based environmental protection toward support of a 'balanced' approach of some kind."[72] In contrast, advocates have continuously called for stricter regulation and conservation efforts, albeit lacking the political power lobbyists yield, in order to protect that which they value most: the environment. The issue at heart then is how does the *judicial system* value nature?

The way nature itself is assigned value is a political decision; while environmental justice movements frame the environment's value as something superseding tangible, measurable designations of worth, the current socioeconomic system equates value to price, limiting the ways in which dispute resolution mechanisms such as courtrooms can conceive environmental harms.[73] The environment becomes, for all practical effects, worth as

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68 Constitución de la República del Ecuador (Oct. 20, 2008) art. 71 ("Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes. All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.").

69 Alice Kaswan, *Environmental Justice and Environmental Law*, 24 Fordham Envt'l. L. Rev. 149, 150 (2013).

70 Westbrook, *supra* note 62, at 691.

71 *See generally* Amended Complaint for Damages, Municipalities of PR v. ExxonMobil, No. 3:22-cv-01550 (D.P.R. Nov. 3, 2023), https://climatecasechart.com/wp-content/uploads/case-documents/2023/20231103_docket-322-cv-01550_complaint.pdf.

72 Driesen, *supra* note 66, at 1795 (footnote omitted).

73 Purdy, *supra* note 49, at 1141-43 (where it is discussed that economic values have always been attached to environmental resources through imperatives of use and development). Purdy further expresses:

much as the production revenue sacrificed for its conservation. This becomes political as, law being the set of norms that regulate the State, the State being formed as a capitalist superpower, capitalism being the pursuit of surplus or profit, law will be fitted or even retrofitted, if need be, to maximize the State's ability to maintain the capitalist mode of production. Law and politics therefore intersect by serving as the two pillars that employ the State's instinct towards self-preservation.

For example, while conservation need not function as an antonym to economic development, much of the law sees it that way. From Act 416, which states that the pursuit of economic development serves as a counterweight to the constitutional mandate of environmental conservation,[74] to the plethora of exceptions in the permits regime that allow for environmental destruction citing necessary development as justification,[75] the environment itself has been left with little to no protection of its own accord. While this might be framed as a natural consequence of characterizing environmental harms as being trans-spatial and transtemporal, the truth of the matter is that this is a consequence of public policy which refuses to shrink economic protections to allow the law to expand environmental protections.[76] The law is surely equipped to manage transtemporal harms, or why else are protests and boycotts under constant fire even though they are protected actions under the First Amendment? Protests and boycotts produce short term monetary harms in pursuit of long-term social gains. Conservation efforts, on the other hand, often lead to the paralysis of construction, development and other similar endeavors that produce short term monetary gains, which is why they naturally become the enemy of economic sectors which dominate lobbyists and other politically influential groups that care little for long term stability.

As such, environmental law —and law in general— has been crafted to only address issues which it can conceive and express in legalese, whereas climate justice sees environmental issues as interconnected, the effects of which lie beyond the language of individual rights. Current legal language seems configurated to safeguard the pursuit —political in nature— of economic development. To the extent in which law does not expand to understand environmental harms and causation in a broader sense, the pursuit of climate justice will be incompatible with established law. In this way, juridification of climate issues shapes the discourse around environmental value and tethers possible solutions to individual rights.

> [T]he aesthetic and spiritual values of nature by contrast with "materialism," which they joined other Progressives in denouncing. In a memorial for Muir, William Colby, the Club's first secretary, warned that "Muir will never be fully appreciated by those whose minds are filled with money getting and the sordid things of modern every-day life" and lamented the indifference of "those ... engaged in making everything within reach 'dollarable'".

Id. at 1154 (*citing* William E, Colby, *John Muir – President of the Sierra Club*, 10 SIERRA CLUB BULL. 2, 2-3 (1916)).

74 Environmental Public Policy Act, Act 416-2004, 12 LPRA § 8001 (2022).

75 *Categorical Exclusions*, NATIONAL ENVIRONMENTAL POLICY ACT, https://ceq.doe.gov/nepa-practice/categorical-exclusions.html (last visited Apr. 12, 2024).

76 *See generally* Emily Brady, *Environmental Aesthetics and Global Climate Change*, *in* HANDBOOK OF THE PHILOSOPHY OF CLIMATE CHANGE 395 (Gianfranco Pellegrino & Marcello Di Paola eds., 2023).

C. Solving: Judges, Judicial Interpretation and the Sometimes-Fatal Exercise of Discretion

Law's fantastical desire to insulate itself from politics could have been —and should have been— debunked decades ago. Aside from influencing the formation of the body of law through legislation, politics influences judicial interpretation seeing as federal judges are politically appointed instead of democratically elected. Scholars have gone so far as to call for environmental advocates to pressure the President on nominating judges committed to the environmental cause as the main way of enacting environmental protection, which highlights the importance of the judge's role in conservation efforts.[77] When analyzing the meaning of environmental statutes and the concepts attached to them, judges must often rely on sweeping statements regarding the seriousness of environmental damage to extract either objective intent or purpose, while also keeping themselves constrained to established law regarding damages, redressability and standing, analyzed in the previous section. This exercise —statutory interpretation by judges— configures the third aspect of the juridification of climate justice, insofar the exercise of judicial discretion often leans into dogmatic affirmation of precedent or political inclinations while disregarding emerging material reality due to climate change.

Statutory interpretation is by no means a certain science. On one hand, statutes are often complex and riddled with contradictory or imprecise commands, more so after the plethora of usual amendments crafted to guarantee enforcement.[78] Furthermore, language and communicative intent are inherently imprecise, and imprecision —often deliberately— leaves a void that serves the political interests behind legislation.[79] Even when a statute may be clear, its interpretation will still be the object of debate.[80] On the other hand, interpretation, as a cognitive exercise, involves different stages of understanding premises, untangling meaning, identifying problems and forging a solution. However, judicial interpretation goes beyond this mere mechanical exercise because it is the means through which law gains meaning —and becomes authority. As such, interpretation and the debates surrounding it are "not about what statutes mean as a matter of linguistic fact, but about which grounds for the attribution of an invented meaning would best promote judicial and governmental legitimacy."[81]

This added layer —the promotion of judicial and governmental legitimacy— is often attached to the principle of *stare decisis*, or respect for precedent; the theory behind *stare decisis* is that stability in judicial decision-making bolsters the judiciary's legitimacy as their decisions become more transparent, their outcomes more easily predictable for citizens and observers. *Stare decisis* provides a basis for consistency in rulings. However, *stare*

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77 Canaan Suitt, *The Promise and Perils of Textualism for Environmental Advocacy*, 46 Wm. & Mary Env't. L. & Pol'y Rev. 811, 831 (2022).

78 John M. Walker Jr., *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 N.Y.U. Ann. Surv. Am. L. 203, 204 (2001).

79 *Id.*

80 *Id.* (where it is discussed that carefully crafted statutes may mean different things to different readers).

81 Richard H. Fallon Jr., *The Statutory Interpretation Muddle*, 114 Nw. U. L. Rev. 269 (2019).

decisis can become a constraint for judges hearing novel controversies or old controversies in a novel context:

> Doctrines like *stare decisis* prompt courts to apply settled law in a settled way because to do so treats current litigants like past ones, yet the status quo understanding of tort law, constitutional provisions, and environmental statutes renders them insufficient when applied to environmental justice cases. Those communities therefore have limited recourse to remediation and compensation because they lack a legal entitlement. If the communities nevertheless assert a legal entitlement, then the defendants will raise procedural obstacles in an attempt to have the court stop short of the plaintiffs' claim. Defendants can argue their own legal entitlement to dismissal through justiciability doctrines like political question and standing. Or they can highlight the plaintiffs' lack of legal entitlement by arguing that the settled law does not allow for the relief sought. Either way, the court can more easily side with the settled and neutral language of procedure because a judge needs little justification to adhere to the status quo.[82]

Thus, if precedent exists dictating, for example, standing to sue for environmental harms, judges will be hard-pressed to stray from that precedent. Precedent is highly valued in the judicial system —which seeks to reaffirm the legitimacy of laws and their application, and thus, preserve itself and the status quo— and as such the courts have established a lofty standard to overrule established law.[83]

If the two pursuits of statutory interpretation are to guarantee citizens security and coherence in their judicial system, and the promotion of institutional legitimacy, how should judges proceed with statutory interpretation? More importantly, how does the manner in which interpretation is undertaken affect the possibility of achieving justice through the judiciary? Theorists have speculated that this exercise has two main components: the rules or methods of interpretation that judges apply, and the theories or philosophies of interpretation that judges adhere to. The former was discussed in part in the previous section, as rules surrounding claiming, standing and redressability are some of the main rules that guide judges in navigating environmental claims. The latter begs further discussion, as it is the exercise of judicial discretion which dictates how the rules will be applied —or dispensed with— when faced with a particular set of facts.

i. Mapping the Exercise of Discretion: Textualism and Purposivism

Statutory interpretation seeks to determine legislative intent to adjudicate a controversy. However, legislatures are collective bodies, which cannot be said to have a single communicative intent, in contrast to individuals. Two models have arisen which purport

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82 Todd, *supra* note 17, at 210 (footnotes omitted).

83 *The Supreme Court's Overruling of Constitutional Precedent*, CONGRESSIONAL RESEARCH SERVICE (Sep. 24, 2018), https://www.everycrsreport.com/files/20180924_R45319_3cafb6dc6b134c9a1c83eff9bfb780a3b904bd3a.pdf (discussing the factors to be considered when overruling precedent: quality of reasoning, workability, inconsistency with related decisions, changed understanding of relevant facts, reliance).

to explain how this process occurs, based largely on competing conceptions of the law: textualism and purposivism. Textualism believes that law achieves its status as law, thus as supreme mandate, when it is enacted by the legislature. A judge's role is to understand the law as given and interpret it in such a way that interpretation is faithful to the plain meaning of the statute as written. The role of the judge is not to be concerned with the wisdom of the policy implemented by the statute, or how just or positive the consequences of its implementation may be when the statute is clear and unambiguous.[84] Proponents of this model of interpretation assert that "[t]he text is the law, and it is the text that must be observed."[85]

Purposivists, however, believe that the law is not complete until *after* the exercise of statutory interpretation by judges. The purposivist thought process can be resumed in this passage written by the Court of Appeals: "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[86] Purposivists take into account the economic and social contexts of both the time of enactment of the law, and the present day circumstances, to then decide if a certain interpretation of the law is in line with the purpose the Legislative Branch had at the moment of conceiving said law to govern over particular facts.

While both models have been subjected to criticism,[87] they both continue to be accepted proposals for adequate statutory interpretation. As such, environmental claims must be analyzed against both backdrops to understand how this leg of the juridification process serves or severs principles of environmental justice.

Textualism has become a pillar of the conservative legal movement since its inception (unsurprisingly, as its birth is frequently attributed to Antonin Scalia).[88] However, scholars argue that textualism is not inherently conservative, rather that the conservative movement saw in textualism an opportunity to reign in what was considered liberal or progressive momentum in the courts and, thus, adopted and advanced it as a favored interpretation mechanism.[89] Notwithstanding, the result has been that textualism has developed a tight connection with conservative positions, one of the most prominent being loosening statutory environmental protections. Johnson argues that the rise of textualism

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84 Walker, *supra* note 78, at 205-06 (citation omitted).

85 Antonin Scalia, A matter of interpretation: Federal Courts and the Law 22 (1997).

86 Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

87 This criticism is illustrated by Walker:

> Neither conception has been exempt from criticism. The first is subject to claims that it is wooden and subject to mindless application; that it permits odd results that could not have been intended by the legislature; and that it may lead to injustices in particular cases. The second invites the charge that, in departing from the text in an effort to reach the "best" result in a particular case, it unsettles the law, obscuring it to the layman and his lawyer-advisor, and permits unelected judges to effectively enact their own personal preferences, robbing the law of its objective character while violating the Constitution's prescriptions on lawmaking in Article I, § 7, and the separation of powers between Articles I and III.

Walker, *supra* note 78, at 206.

88 *See generally* Jonathan R. Siegel, *The Legacy of Justice Scalia and his Textualist Ideal*, 85 Geo. Wash. L. Rev. 857 (2017).

89 Suitt, *supra* note 77, at 817.

has been partly responsible for the courts' diminished focus on the environmental and public health purposes of environmental law when interpreting said statutes, deferring to agencies regardless of whether agency enforcement is in line with the legislative intent of environmental statutes.[90] Suitt asks us to consider judges' use of textualism alongside other factors when considering interpretation of environmental law: "[A] judge's commitment to textualism should be considered alongside other salient features of their political leanings that inform interpretation. In the context of environmental advocacy, two features are especially salient: general conservative skepticism of environmental causes and modern conservatism's pro-business, anti-regulatory commitment."[91]

Considering that, as explained in subsection B, environmental regulation is now conducted through the establishment of markets via legislation such as the Clean Air Act, a judge's adherence to conservatism directly influences his or her interpretation of said legislation. This, in turn, directly impacts advocates seeking favorable rulings under legislation such as the Clean Air Act, further constraining the usefulness of the legal system for environmental social movements.

Purposivists, on the other hand, may seem more sympathetic to environmental causes at first glance. During the early days of environmental enforcement, purposivists ruled broadly and frequently in favor of environmental protection.[92] While purposivism was the main legal trend in the 1970s and 1980s, the aforementioned rise in textualism has gradually relegated purposivism to a distant second place. For example, a review of the history of the Clean Water Act by Johnson reveals that a Burger Court supported its decisions citing water quality protection purposes, whereas the Rehnquist and Roberts Courts have supported their decisions not on protection purposes, but on the grounds of states' rights.[93]

Climate change is challenging both purposivists and textualists due to its status as a relatively novel, urgent, and all-encompassing phenomenon that is interwoven with public policy decisions on economic development. Judges are traditionally constrained by precedent and notions of judicial temperament, often limiting themselves to merely applying established law. They are further constrained by the separation of powers doctrine, often ruling in narrow and tepid ways to not encroach on another branch's domain. However, judges hold immense power once an environmental justice issue is brought before them. The way they choose to view a case and the rights of parties involved allows them plenty of space to not just apply the law but wield it in the pursuit of justice. This is the argument that favors judges employing equity —the least used of the hierarchical sources of law— to address cases that present novelty and/or groundbreaking implications:

> Perelman calls equity the "crutch of justice" because it can support a decision whenever the law appears "lame"—where it is too limited to afford an adequate

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90 *See* Stephen M. Johnson, *Whither the Lofty Goals of the Environmental Laws?: Can Statutory Directives Restore Purposivism When We Are All Textualists Now?,* 49 PEPP. L. REV. 285 (2022).

91 Suitt, *supra* note 77, at 824.

92 Richard J. Lazarus, *The Greening of America and the Graying of United States Environmental Law: Reflections on Environmental Law's First Three Decades in the United States*, 20 VA. ENVT'L L.J. 75, 95 (2001).

93 Johnson, *supra* note 90, at 308-09.

> remedy . . . [T]he "sense of equity" is not limited to supplementing the law, however, because it also includes instances where a party contests the justness of a rule by arguing for the reconsideration of precedent or for new interpretation of a rule.[94]

No matter what the precedent has established or what the dominating political climate expects, judges can always determine the significance and direction of a dispute through their power "to choose which rule shall be accorded priority to settle the dispute in question."[95] In environmental justice cases, where experts and advocates agree that the current body of law is often insufficient to address the magnitude of climate change and its implications, equity grants judges the leeway to substitute that insufficiency with broader relief, as is within their purview and knowledge.

III. Illustrating Juridification: Climate Justice in Action, Courts in Reaction

The most direct way to translate an abstract concept like juridification to concrete processes is through examples. This section is not meant as an in-depth study of all climate issues present in the cited cases but rather as a series of snapshots through which the phenomenon of juridification is illustrated through environmental justice litigation in four areas: Claiming, Standing, Redressability, and Interpretation. The remaining factor, Regulation, will be analyzed as a factor permeating all the others.

A. Claiming in Municipalities of PR v. ExxonMobil

Municipalities of Puerto Rico v. ExxonMobil could shape up to be one of the most significant climate litigation cases of the decade. In a first-of-its-kind class-action lawsuit, a group of municipalities appears as plaintiffs, arguing that the defendants engaged in a corporate worldwide strategy to deliberately misinform about their products' and activities' link to climate change in order to continue refining, marketing, and selling fossil fuel products which have caused widespread climate devastation.[96] This lawsuit is unique in that: (1) it is the first climate damages lawsuit filed against fossil fuel companies in Puerto Rico; (2) it is the first climate case alleging harm against cities as a class, and (3) it is the first climate case to incorporate the Racketeer Influenced and Corrupt Organizations Act (RICO) into its claims.[97] Plaintiffs assert at least fourteen causes of action against defendants, including violations of the RICO Act, common law consumer fraud, antitrust, public nuisance, and unjust enrichment, among others.[98] If claiming is the story told to invoke

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94 Todd, *supra* note 17, at 208.

95 Chaim Perelman, Justice, Law And Argument: Essays On Moral And Legal Reasoning 78 (2012).

96 Complaint for Damages, at 5-6, Municipalities of Puerto Rico v. Exxon Mobil, No. 3:22-cv-01550 (D.P.R. Nov. 22, 2022).

97 Korey Silverman-Roati & Maria Antonia Tigre, *Municipalities of Puerto Rico v. Exxon: a unique class action against fossil fuel companies presses for climate accountability in the United States*, Climate Law: A Sabin Center Blog (Dec. 2, 2022), https://blogs.law.columbia.edu/climatechange/2022/12/02/municipalities-of-puerto-rico-v-exxon-a-unique-class-action-against-fossil-fuel-companies-presses-for-climate-accountability-in-the-united-states/.

98 Complaint for Damages, *supra* note 96, at 197-244.

rights, the claims in a groundbreaking lawsuit must tell an equally compelling story. However, a case with such a broad scope of environmental justice claims will undoubtedly be caught between choosing safer claims to assure claim plausibility and experimental claims to highlight the uniqueness and severity of the alleged climate damages.

In this case, the pleadings have framed Puerto Rico as the "'canary in the coal mine' for climate change,"[99] already invoking a powerful image: a small, bright-feathered bird that is highly susceptible to environmental toxins. The allegory serves by placing sympathy on the plaintiffs' side, who compare their protagonist, Puerto Rico, to a small bird synonymous with joy being placed in peril for someone else's profit. This claim does little to assure claim plausibility but bolsters the narrative component and gives the *audience* —the judge, in this case— someone to root for.

A David-Goliath narrative consequently unfolds. Tiny, fragile Puerto Rico, is opposite the conglomerate of oil and coal giants, jointly responsible for forty point one percent "of the total worldwide greenhouse gases emitted between 1965 to present date"; this number is still increasing.[100] Skillfully, as the lawsuit goes on, it weaves the more *factual* claims into the already established narrative, namely how: (1) the defendants' production, promotion, and sale of fossil fuel products played a significant role in the September 2017 hurricanes; (2) how defendants' acts continue to accelerate the deterioration of the climate; (3) how the defendants obtained scientific information that informed them of the dangers caused by their products, yet they misrepresented the dangers and hid them through a coordinated campaign of climate change denial; (4) how they conspired to lower prices in order to make non-fossil fuels non-viable for consumers, thus protecting their monopoly; (5) how municipalities were impeded from making substantial steps to mitigate the onslaught of climate change due to the defendants' concealment of facts necessary to understand the magnitude of climate change, and (6) how the defendants' deceptive conduct and their consumers' reliance on it have caused a wide range of climate-related issues, such as global warming, ocean acidification, coral reef destruction, rising sea levels, and extreme weather events.[101]

By framing Puerto Rico as a warning,[102] the plaintiffs subtly communicate that there is more to come should we continue down the path of unaccountability of fossil-fuel industries. The narrative framework used is reminiscent of principles of environmental justice (i.e. fairness and equitable treatment). At the same time, there is ample substantive content to survive a motion to dismiss (i.e. particularized harm as documented following the 2017 hurricanes and causation as proven by the companies' internal scientific investigations).[103]

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99 *Id.* at 56 (*citing* Janice Cantieri, *Puerto Rico: A "canary in the coal mine" for climate change*, MEDILL REPORTS CHICAGO (Dec. 7, 2016), https://news.medill.northwestern.edu/chicago/puerto-rico-a-canary-in-the-coal-mine-for-climate-change/.

100 *Id.* at 19.

101 *Id.* at 4-5, 7, 17-18, 21.

102 *Id.* at 56 n.178 (The idiom *canary in a coal mine* refers to a warning sign or indicator of potential danger. It originates from the practice of coal miners who would carry caged canaries into coal mines. Canaries are particularly sensitive to gases such as carbon monoxide and methane, which can be present in coal mines. If the canary became ill or died, it served as an early warning sign to the miners that dangerous gases were present, and they needed to evacuate the mine immediately to avoid harm.).

103 *Id.* at 141.

Relying on deception as the factor that gives rise to liability is also an important choice at the pleading stage. Most climate cases are hard-pressed to prove causation because they try to link a particular harm with a specific action despite climate damages being transtemporal and trans-spatial. However, shifting the focus from *what the defendants did to cause damage* to *what they knew while they were doing it and how they tried to conceal the true degree of the consequences of their actions* adds a degree of malice that courts would be remiss to obviate, "[d]espite their internal knowledge, when the public was informed what they already knew, they chose to hijack science and falsely denied, distorted and minimized the significant adverse consequences of their products."[104] The power of this narrative is that if the internal documents cited by the plaintiffs are taken as true, the defendants cannot claim any of the usual defenses against climate damage claims because they were acutely aware and took steps to conceal the chain of causation in an effort to maintain profits.

Claiming RICO Act violations is an innovative, albeit double-edged, choice. The RICO Act was originally conceived to expand the tools available for the prosecution of the mafia and similar gang activity, where high-ranking members would usually mastermind the crimes without direct participation.[105] In recent years, however, its use has been expanded to civil suits of different kinds, including the prosecution of the environmentalist and anti-policing group Stop Cop City, which raises valid concerns about the continued expansion of this Act's reach.[106] In this case, the plaintiffs contend that the defendants' acts intentionally defrauded them and led them to accept a substantial risk they would not have accepted otherwise.[107] Among these acts, the plaintiffs cite: (1) the creation and funding of the Global Science Communication Team Action Plan, whose mission was to undermine the science behind climate change in a concerted effort to deceive and profit from said deception; (2) the greenwashing campaigns that misrepresented the oil and gas companies' actual plans to combat climate change, promoting phony solutions, and (3) the concerted action to lower oil and gas prices in order to make renewable energy sources expensive and unattainable, among others.[108]

What becomes clear is that the RICO Act violations are significant claims in terms of the narrative component of this lawsuit: the implications of a global scheme of collusion between climate denial and fossil-fuel industries would be felt in every legal system across the world. Furthermore, while the RICO Act was conceived for situations like these, where the highest-ranking officials were safe behind the smokescreen of accomplices and cronies, the truth is that the 'factual' component of Ashcroft's claim plausibility threshold still lurks in the shadows. While we do not doubt that environmental justice is better served by holding every person accountable (particularly those responsible for forty point one percent of global emissions), the current political climate might just as easily take this

104 *Id.* at 225.

105 *See* Lindsey T. Mills, *Applying RICO to Street Gang Thugs: Using the Commerce Element to Keep Some Crimes Out of Federal Reach*, 81 Temple L. Rev. 871, 876 (2008).

106 Indictment at 24-25, State of Georgia v. Morgan, No. 23SC189192 (Sup. Ct. Fulton Cnty. Aug. 29, 2023), https://www.documentcloud.org/documents/23940338-cop-city-rico-indictment.

107 Complaint for Damages, *supra* note 95, at 221.

108 *Id.* at 7, 106, 215.

possible victory and turn it on its head to expand RICO Act targets to any who engage in a number of protected activities, such as protesting.[109]

The case is progressing slowly, as is to be expected if the *Lago Agrio* Judgment is any indication of corporations' response when sued for environmental damages.[110] However, on January 18, the Court entered an order denying the motions to dismiss as moot, which means the case will soon be seen on its merits.[111] A case of this magnitude, with overarching environmental justice issues such as the fossil fuel industry's responsibility for climate change, necessarily includes both components of an effective claiming strategy: plausible allegations and compelling narratives.

B. Standing in Held v. Montana

Although *Held v. Montana* does not establish a federal precedent, it is a remarkably promising decision for environmental justice advocates for its progressive stance on the environmental standing question. In *Held*, a group of youth plaintiffs sued the state of Montana, alleging that a provision of the Montana Environmental Policy Act (MEPA) violated their state's constitutional right to a clean and healthful environment by barring consideration of climate change in environmental reviews.[112] As expected, the defendants filed a motion to dismiss, alleging causation is unprovable, thus implying that the plaintiffs lack standing.[113] Nonetheless, the District Court allowed the plaintiffs to proceed with their constitutional and public trust claims.[114]

The Court's first argument was that federal precedent interpreting Article III standing is merely persuasive authority when it comes to interpreting state constitutional standing requirements.[115] It previously cites Helena to refuse to apply a restrictive view of injury-in-fact, which usually requires particularized harm not shared by other citizens: "to deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread government actions could be questioned by nobody."[116] The Court then relies on precedent that is favorable to envi-

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109 *See generally* William L. Anderson & Candice E. Jackson, *Law as a Weapon: How RICO Subverts Liberty and the True Purpose of Law*, 9 THE INDEPENDENT REV. 85 (2004).

110 *See* Aguinda v. Chevron, Case No. 2003-0002 (Ecuador Feb. 2011); Chevron Corp. v. Steven Donziger, No. 14-0826 (2d Cir. 2016) (depicting the series of cases stemming from Chevron's extensive contamination of the Amazon Rainforest, which has been litigated for more than 15 years in at least 3 different forums, and after which Chevron has not paid a single cent to the affected communities).

111 *Municipalities of Puerto Rico v. Exxon Mobil Corp.*, SABIN CENTER FOR CLIMATE CHANGE LAW, https://climatecasechart.com/case/municipalities-of-puerto-rico-v-exxon-mobil-corp/ (last visited Apr. 12, 2024).

112 Findings of Fact, Conclusions of Law, and Order, at 1-2, Held v. Montana, No. CDV-2020-307 (1st. Jud. D. Ct. Mont. Aug. 14, 2023), https://climatecasechart.com/wp-content/uploads/case-documents/2023/20230814_docket-CDV-2020-307_order.pdf.

113 Motion to Dismiss, at 2, Held v. Montana, No. CDV-2020-307 (Mont. 1st. Jud. D. Ct. Aug. 4, 2021), https://climatecasechart.com/wp-content/uploads/case-documents/2021/20210804_docket-CDV-2020-307_order.pdf.

114 *Id.* at 24.

115 *Id*. at 8.

116 Order on Defendant's Motion to Dismiss for Mootness and for Summary Judgment, at 7-9, Held v. Montana, No. CDV-2020-307 (1st. Jud. D. Ct. Mont. May 23, 2023) (*citing* Helena Parents Comm'n v. Lewis & Clark County Comm'rs, 277 Mont. 367, 374, 922 P.2d 1140 (1996)).

ronmental claims (a statutory interpretation choice) —such as *WildEarth Guardians* and *Juliana*— to state that causation can be established even when the defendant is not the sole source of the alleged injury, and that properly establishing causation is dependent on evidentiary proof brought at a future stage of the proceedings.[117] The Court employs a reasoning similar to *Ohio Valley*,[118] where contribution to injury was sufficient to establish standing, to analyze Montana's actions as significantly contributing to climate change. The Court goes on to explain that Montana's overall contribution to national GHG emissions harmed the plaintiffs' physical and psychological health, interfered with family and cultural foundations, and caused economic deprivation.[119]

This reasoning serves environmental justice in two ways. First, it allows claims of climate damages, which are transtemporal and trans-spatial, to be heard by omitting the usual tort causation logic. Second, by employing a broad view of causation while simultaneously releasing itself from the shackles of Article III standing, it provides procedural access to later stages of the trial process, where more substantial evidence can be brought in favor of climate plaintiffs, thus honoring one of the base tenets of environmental justice.

Held stands mostly alone in a field of environmental claims, and yet should serve as a guiding light for future courts. However, this case contains a set of particular facts that may separate it from other environmental claims that we must point out before asserting claims of widespread utility for every environmental justice case. First, the Court specified that the plaintiffs' age was a particularly significant factor, nothing that the youth plaintiffs, all aged 18 or younger, would be disproportionately harmed by climate damages and would face lifelong hardship. Second, the regulation at stake was a state administrative provision that was challenged by invoking a state constitutional right to a healthy environment, which is not available in every state. Notwithstanding, *Held* represents an instance in which environmental justice claims overcame the hurdles of *juridification* and achieved a favorable ruling. It must be said, however, that positive juridification (or juridification that results in a positive albeit limited solution) can still stand as a barrier to institutional transformation by creating complacency. Victories such as *Held* must necessarily be accompanied by advocacy in multiple fronts to become truly cemented as the law of the land; otherwise, hostile reactionaries and uninspired advocates may create the perfect storm for reversal of the ruling or a "toothless" decision. In the end, however, *Held* was unsurprisingly celebrated as a landmark ruling in favor of environmental rights, possibly widening the path for broader claims from aggrieved climate plaintiffs.[120] While standing was conceded in *Held* due to the precision of the claims and relief sought, an expansive approach explains the unfavorable ruling below, in *Juliana*.

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117 Order on Motion to Dismiss, at 9, Held v. Montana, No. CDV-2020-307 (1st. Jud. D. Ct. Mont. Aug. 4, 2021) (*citing* WildEarth Guardians v. United States Dept. of Agric., 795 F.3d 1148, 1157 (9th Cir. 2015) and Juliana v. United States, 947 F.3d 1159 (9th Cir. 2020)).

118 Ohio Valley Envt'l. Coalition, Inc. v. Hobet Min., 702 F. Supp.2d 644, 650-51 (S.D.W.Va. 2010).

119 Findings of Fact, Conclusions of Law, and Order, *supra* note 112, at 18.

120 Amy B. Hanson and Matthew Brown, *Young environmental activists prevail in first-of-its-kind climate change trial in Montana*, AP News (Aug. 14, 2023), https://apnews.com/article/climate-change-youth-montana-trial-c7fdc1d8759f55f60346b31c73397db0.

C. *Redressability in Juliana v. United States*

In stark contrast to *Held*, the Ninth Circuit denied plaintiffs standing in *Juliana v. United States* because their alleged injuries were not redressable by court order.[121] The plaintiffs here sued the US government and various executive officials for violations to their due process rights of life, liberty and property due to their endorsement and continuous use of fossil fuels.[122] Although the *Juliana* plaintiffs succeeded in demonstrating particularized harms and establishing a chain of causation, the Court determined that the relief sought —a comprehensive plan for the government to phase out the use of fossil fuels— was, albeit impressive, not suitable as judicial redress:

> [I]t is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches.[123]

The problem with environmental justice claims that fail the redressability threshold is the particularly acute sense of helplessness that may overcome onlookers after the unfavorable ruling. As stated in the introduction, the conflation of justice and the judiciary is a widespread view of justice. When the judicial branch throws up its hands, effectively recognizing their inability to dispense justice, environmental advocates can —understandably— feel a sense of despair and futility. The Court here states that the appropriate remedy should be doled out by Congress, the President and the pertinent government agencies;[124] but it is precisely their inaction that led to the injustice brought before the court. This circularity can be frustrating as advocates frequently take their claims to the legislative and executive branches via press conferences, comments during environmental review, petitions to FERC's Office of Public Participation, protests, emails/calls to their representatives' offices, and rarely see real, substantive change. The scale and magnitude of climate change demands a cohesive, unflinching approach, and courts should not shy away from their power to demand the other branches to protect the Constitution and the people. Judge Staton's dissent powerfully stated that the Constitution does not condone the willful destruction of the Nation. It would be absurd to disagree with that statement based on the lack of explicit constitutional protection for the Nation, because without a thriving nation, there is no Constitution.[125] Staton would have ruled in favor of the plaintiffs, observing that relief for climate damages does not mean that said relief must halt climate change:

> No case can singlehandedly prevent the catastrophic effects of climate change predicted by the government and scientists. But a federal court need not man-

121 Juliana v. United States, 947 F.3d 1159, 1174 (9th Cir. 2020).
122 *Id.* at 1164-65.
123 *Id.* at 1171.
124 *Id.* at 1172.
125 *Id.* at 1175 (Staton, J., dissenting).

> age all of the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate change does not mean that it presents no claim suitable for judicial resolution.[126]

The threshold for redressability, just as the threshold for causation, should be lowered in climate cases so as not to bar valid environmental justice claims from being heard on their merits; it is a disservice to the purposes of the Judicial Branch for a judge to explicitly state that a right is being violated but refuse to address that violation. Judicial resolution might not solve climate change, but when seen as a factor to be cumulatively accounted with other advocacy efforts, judicial resolution can significatively "create at least persuasive authority to move the needle of the law toward environmental justice."[127]

D. Interpretation in Massachusetts v. EPA

The dilemma of judicial interpretation as a manner of *juridification*, both its strong points and its contradictions, is illustrated perfectly in the opposing views adopted in Justice Stevens' majority opinion and Justice Scalia's dissent in *Massachusetts v. EPA*. What is most extraordinary about the judicial interpretation models in this case is that, from a textualist point of view, the majority was correct. The Clean Air Act explicitly defines an air pollutant as "'*any air pollution agent . . . including any . . . substance . . . which enters the ambient air*.'"[128] However, the Court's leading textualist at the time, Justice Scalia, dissented in an apparent refusal to plainly apply his own favored model of interpretation. Rather, in a selective application of textualism, Scalia prioritizes specific words within the text to reach the desired conclusion; textualism's apparent neutrality falters when a plain reading of the text would lead the interpreter to a result contrary to the interpreter's political leaning. Consider the following passage from the dissenting opinion:

> "Air pollutant" is defined by the Act as "any air pollution agent or combination of such agents, including any physical, chemical, . . . substance or matter which is emitted into or otherwise enters the ambient air." The Court is correct that "[c]arbon dioxide, methane, nitrous oxide, and hydrofluorocarbons," fit within the second half of that definition: They are "physical, chemical, . . . substance[s] or matter which [are] emitted into or otherwise ente[r] the ambient air." But the Court mistakenly believes this to be the end of the analysis. In order to be an "air pollutant" under the Act's definition, the "substance or matter [being] emitted into . . . the ambient air" must also meet the *first* half of the definition—namely, it must be an "air pollution agent or combination of such agents." The Court simply pretends this half of the definition does not exist. The Court's analysis faith-

126 *Id*.

127 Todd, *supra* note 17, at 200.

128 Massachusetts v. EPA, 549 U.S. 497, 506 (2007) (emphasis added).

> fully follows the argument advanced by petitioners, which focuses on the word "including" in the statutory definition of "air pollutant." As that argument goes, anything that *follows* the word "including" must necessarily be a subset of whatever *precedes* it. Thus, if greenhouse gases qualify under the phrase following the word "including," they must qualify under the phrase preceding it.[129]

Scalia accuses the majority of deferring "only to those reasonable interpretations that it favors," without realizing, perhaps, that his reasoning is also susceptible to that same criticism. His assertion that the definition of air pollutant "must also meet the first half of the definition" is a subjective interpretation of the legislative intent, as that requisite is nowhere to be found in the definition under controversy.[130] The mandate of fulfilling both *parts* of the definition, on which Scalia relies to dissent from a majority opinion increasing federal regulation of the business-environment relationship —regulation coincidentally opposed by the conservative movement— seems to be drawn from an exercise of judicial activism and not from the plain language of the statute.[131]

On the other hand, Stevens, undoubtedly a purposivist in nature,[132] bolstered the already sound literal interpretation of the CAA's text with an incorporation of other factors relevant to the context of the decision: he mentioned the IPCC, the Kyoto Protocol, scientist reports, and several other extrajudicial materials to reaffirm the correctness of the majority opinion. Through recounting the history regarding how Congress has tackled the issue of climate change, as well as how the science around it has developed, Stevens purports to understand what the legislative intent with the CAA's regulation of GHGs is:

> The Clean Air Act's sweeping definition of "air pollutant" includes "*any* air pollution agent or combination of such agents, including *any* physical, chemical ... substance or matter which is emitted into or otherwise enters the ambient air . . . ." §7602(g) (emphasis added). On its face, the definition embraces all airborne compounds of whatever stripe, and underscores that *intent* through the repeated use of the word "any." . . . The statute is unambiguous.[133]

He concludes that Congress was unambiguous in its intent to include carbon dioxide within the definition of air pollutant using the expansive determiner *any*, which is employed to signify an indefinite or unlimited quantity. Both Scalia and Stevens had to determine the breadth with which Congress intended to employ this determiner, as a textual

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129 *Id.* at 556 (Scalia, J., dissenting) (citations omitted).

130 *Id.* at 558.

131 Hiroko Tabuchi, *A Potentially Huge Supreme Court Case Has a Hidden Conservative Backer*, THE NEW YORK TIMES (Jan. 16, 2024), https://www.nytimes.com/2024/01/16/climate/koch-chevron-deference-supreme-court.html ("Rolling back the power of the state to regulate business has been a longstanding goal of conservative legal activists and their funders, who have been engaged in a yearslong effort to use the judicial system to rewrite environmental law.").

132 *See* Kathryn A. Watts, *From Chevron to Massachusetts: Justice Stevens's Approach to Securing the Public Interest*, 43 U.C. DAVIS L. REV 1021 (2010).

133 Massachusetts v. EPA, 549 U.S. at 528-29 (emphasis added).

reading leads, grammatically, to an indeterminate conclusion. While Scalia insisted on a literal reading through which *any* had to be restrained, Stevens insisted on infusing *any* with meaning by channeling legislative intent. In any case, their interpretation of the word *any* was undoubtedly informed by their interpretation models, which reflect their policy and political preferences.

Regardless of the authors of each opinion, *Massachusetts v. EPA* is revealing in demonstrating how, in the face of novel controversies regarding environmental justice, judges' interpretations may be influenced by their political views, leading them to adopt a meaning that aligns with their ideological leanings.[134] This is one of the perils of the juridification of climate justice through judicial interpretation; even when the statutory text supports an interpretation favorable to environmental justice, a judge's political inclination may sway the exercise of discretion towards unexpected or unforeseeable results. Juridification through interpretation subjects the all-encompassing notion of environmental justice to being constrained by political understanding of legal entitlements in a specific case.

Conclusion

Environmental justice stems from a crossroads in the modern history of oppressed peoples; their material reality gave way to an expansion of social imagination. Even before communities articulated their demands in the language of environmental justice, Indigenous communities recognized the importance of protecting the environment, not as an incidentally to human rights, but as necessary for continuous spiritual growth and the prosperity of humanity. Limiting environmental justice to judicial justice carries with it the dangers of juridification. Rules governing pleading limit the scope of environmental justice demands. Rules governing standing limit procedural access to the courts. Environmental regulations limit environmental justice to its purely economic aspects. Judicial interpretation limits environmental justice to what is politically sound and legally plausible. In sum, juridification of environmental justice carried too far may move the political order towards total legal domination and curtail the power of the social imaginary to effect change.[135]

Proper environmental protection does not have to revolve around what courts can mandate. While in the US, the juridification of environmental justice has created a patchwork of laws and regulations that seem to do too little, too late, other parts of the world have moved beyond looking to the legal system as a one-size-fits-all conflict resolution forum. Guyana, for example, reported a deforestation rate of 0.07 percent in 2023.[136] This is a considerable statistic, as almost ninety percent of Guyana's land is

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134 Driesen et al., *supra* note 66, at 1830. *See also generally* Todd A. Gormley et al., *When do Judges Throw the Book at Companies? The Influence of Partisanship in Corporate Prosecution* (2022) (discussing that Republican-appointed judges dole out stricter punishments where illegal immigrants are involved, whereas Democrat-appointed judges dole out stricter punishments for environmental violations).

135 Blichner & Molander, *supra* note 26, at 53-54.

136 Anggrita Cahyaningtyas, *Making the Most of forest monitoring in Guyana*, Forests News, https://forests-news.cifor.org/70576/making-the-most-of-forest-monitoring-in-guyana?fnl=en#:~:text=Situated%20in%20the%20center%20of,data%20from%20Global%20Forest%20Watch (last visit Apr. 24, 2024).

covered in trees.[137] In Guyana, farmers, teachers and hunters form *ad hoc* patrol groups to track loggers and miners, while Indigenous tribes employ tools received by international conservation partners to preserve and protect the environment.[138] Environmental justice is being made and not through courts —although courts have an important role to play since they must uphold the law stating that Indigenous land titles are absolute and irrevocable, in stark difference with Peru or Brazil, which do not extend the same protection to land titles, leaving them vulnerable for aggressive targeting by the mining and logging sectors.[139] In Guyana, environmental protection has not been juridified; it remains in the social sphere, a topic for which people mobilize. Courts are supplementary actors, not primary protectors of the environment. This holistic approach, decentering juridification and instead providing baseline support to traditionally marginalized actors, has proven itself not only effective, but in line with both the procedural and substantive aspects of Environmental Justice, leading to ecological sustainability.

The environment is not merely what it can yield. Nonetheless, our legal system developed in such a way that prioritized individual socioeconomic rights and made environmental protection contingent on those rights being respected. Individual rights, however, will not protect us from the global challenge of climate change. Our current material reality is demanding we rethink every approach to environmental protection upon which we have previously relied. Climate change is drastically worsening and has been inextricably linked to human activity that is considerably regulated under laws and statutes. The demand to rethink our approaches includes the judiciary but should not be limited to it. Imagination is a crucial tool for facing climate change, as unprecedented problems demand creative solutions. Nevertheless, while the judiciary must certainly broaden its understanding of environmental justice, advocates should not limit themselves to the justice that can be achieved through institutions partly responsible for the original injustice. Lady Justice's willful blindness has increasingly become a disservice to reality; or is the world meant to stop burning simply because we refuse to look at it?

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137 *Guyana*, Global Forest Watch, https://www.globalforestwatch.org/dashboards/country/GUY/?category=summary&dashboardPrompts=eyJzaG93UHJvbXB0cyI6dHJ1ZSwicHJvbXB0c1ZpZXdlZCI6W10sInNldHRpbmdzIjp7Im9wZW4iOmZhbHNlLCJzdGVwSW5kZXgiOjAsInN0ZXBzS2V5IjoiIn0sIm9wZW4iOnRydWUsInN0ZXBzS2V5IjoiZG93bmxvYWREYXNoYm9hcmRTdGF0cyJ9&location=WyJjb3VudHJ5IiwiR1VZIl0%3D&map=eyJjZW50ZXIiOnsibGF0Ijo0Ljg2Mzk3MzcwMzkxNjM4LCJsbmciOi01OC45MzM1NzQ2NzUwMTcxN30sInpvb20iOjUuNDc3ODg2NDYyODM5Nzg4LCJjYW5Cb3VuZCI6ZmFsc2UsImRhdGFzZXRzIjpbeyJkYXRhc2V0IjoicG9saXRpY2FsLWJvdW5kYXJpZXMiLCJsYXllcnMiOlsiZGlzcHV0ZWQtcG9saXRpY2FsLWJvdW5kYXJpZXMiLCJwb2xpdGljYWwtYm91bmRhcmllcyJdLCJib3VuZGFyeSI6dHJ1ZSwib3BhY2l0eSI6MSwidmlzaWJpbGl0eSI6dHJ1ZX0seyJkYXRhc2V0IjoidHJlZS1jb3Zlci1sb3NzIiwibGF5ZXJzIjpbInRyZWUtY292ZXItbG9zcyJdLCJvcGFjaXR5IjoxLCJ2aXNpYmlsaXR5Ijp0cnVlLCJwYXJhbXMiOnsidGhyZXNoIjozMCwidmlzaWJpbGl0eSI6dHJ1ZX19XX0%3D.

138 WWF, Maintaining Guyana's Forests for People and the Planet (2022), https://wwfint.awsassets.panda.org/downloads/wwf_factsheet_guyana.pdf. *See also* Chris Arsenault, *Amazon deforestation is rising. Guyana offers a rare bright spot*, Al Jazeera (Nov. 29, 2021), https://www.aljazeera.com/news/2021/11/29/amazon-deforestation-is-rising-guyana-offers-a-rare-bright-spot; *Deforestation in Brazil Amazon rainforest soars 67 percent*, Al Jazeera (Jun. 2021, 2021), https://www.aljazeera.com/news/2021/6/11/deforestation-in-brazil-amazon-rainforest-soars-67-percent.

139 Chris Arsenault, *supra* note 138.